Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

S & D TRADING ACADEMY, LLC,
and S & D GLOBAL TRADING INC.,

Petitioners,

v.

AAFIS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Texas and the federal government each have securities acts that require investment advisers to register with the proper authorities. The acts each contain an exception, however, for persons who are engaged in certain types of activities. One of these exceptions pertains to a "teacher." This Petition presents the following issues:

1. Does the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, which provides that an "investment adviser" does not include a "teacher" "whose performance of the services is solely incidental to the practice of the person's profession," encompasses the activities of Petitioners who were not acting as "brokers" as that term is understood at law and who did not receive transaction-based compensation for their efforts?

2. Whether the Court of Appeals properly followed, or should have followed, several no-action letters issued by the Securities and Exchange Commission (SEC) which interpreted the teacher exception that is contained in the federal Investment Advisers Act of 1940, Act of August 22, 1940, 54 Stat. 847, 15 U.S.C. §§ 80b-1 – 80b-21.

PARTIES TO THE PROCEEDINGS

The Petitioners were Plaintiffs in the District Court and Appellants in the Court of Appeals, and are S&D Trading Academy, LLC, a Texas limited liability company and S&D Global Trading, Inc., a Texas corporation.

The Respondent was the Defendant in the District Court and Appellant in the Court of Appeals, and is AAFIS, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner S&D Trading Academy, LLC is a privately held Texas limited liability company and Petitioner S&D Global Trading, Inc. is a privately held Texas corporation. Both entities are located in Spring, Texas.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINION AND JUDGMENT BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

I. INTRODUCTION 4

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE 5

III. REASONS FOR GRANTING WRIT 9

Issue 1: The Fifth Circuit Court of Appeals erred in interpreting the teacher exception contained in the Texas State Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, because its narrow and restrictive interpretation of the state statute directly contravened Texas state law rules of statutory construction 9

TABLE OF CONTENTS – Continued

Page

Issue 2: The Fifth Circuit Court of Appeals erred to the degree that it gave the "teacher exception" a narrow, restrictive construction, relying solely on SEC opinion letters which interpreted the federal Investment Advisers Act 13

CONCLUSION 21

APPENDIX

Opinion of Fifth Circuit Court of Appeals, 2009 WL 1885881 (2009) ..... App. 1-23

Opinion and Order of the United States District Court for the Southern District of Texas, Galveston Division, 2008 WL 2325167 (S.D. Tex. June 3, 2008). R 1454-1456 ..... App. 24-26

Final Judgment of the United States District Court for the Southern District of Texas, Galveston Division, filed June 3, 2008. R 1458 ..... App. 27

TABLE OF AUTHORITIES

Page

CASES

FEDERAL

Akin v. Q-L Invs., Inc., 959 F.2d 521 (5th Cir. 1992) 12

Allarie Corp. v. Okumus, 433 F.3d 248 (2nd Cir. 2006) 14

Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp., 411 F. Supp. 411 (D. Mass. 1976) 19

Mony Group, Inc. v. Highfields Capital Mgmt., L.P., 368 F.3d 138 (2nd Cir. 2004) 14

S&D Trading Academy, LLC v. AAFIS, Inc., 2009 WL 1885881 (5th Cir. 2009) (App. 1-23) 1

S&D Trading Academy, LLC v. AAFIS, Inc., 2008 WL 2325167 (S.D. Tex. June 3, 2008) (App. 24-26) 1

SEC v. Deyon, 977 F. Supp. 510 (D. Me. 1997) 19

SEC v. George, 426 F.3d 786 (6th Cir. 2005) 19

SEC v. Margolin, 992 WL 279735 (S.D.N.Y. 1992) 18

SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066 (M.D.N.C. 1980) 19

STATE

Energy Service Co. of Bowie, Inc. v. Superior Snubbing Services, Inc., 236 S.W.3d 190 (Tex. 2007) 10

TABLE OF AUTHORITIES – Continued

Page

Guitar Holding Co., L.P. v. Hudspeth Co. Underground Water Conserv. Dist. No. 1, 263 S.W.3d 910 (Tex. 2008) 10

Little v. State of Texas, 246 S.W.3d 391 (Tex. App. – Amarillo 2008, no pet.) 11

Marks v. St. Luke's Episcopal Hosp., ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 1184, 2009 WL 2667801 (Tex. Aug. 29, 2009) 10

Monsanto Co. v. Cornerstones Mun. Util. Dist., 865 S.W.2d 937 (Tex. 1993) 10, 11

Sorokolit v. Rhodes, 889 S.W.2d 239 (Tex. 1994) 10

UFITEC, S.A. v. Carter, 20 Cal.3d 238, 142 Cal.Rptr. 279, 571 P.2d 990 (1977) 19

Williamson Pointe Venture v. City of Austin, 912 S.W.2d 340 (Tex. App. – Austin 1995, no writ) 11

STATUTES

Investment Advisers Act of 1940, Act of August 22, 1940, 54 Stat. 847, 15 U.S.C. §§ 80b-1 – 80b-21 ..... *passim*

Securities Exchange Act of 1934 ("SEC Act") 15 U.S.C. § 78c(a)(4)(A) 18

28 U.S.C. § 1254 ..... 1, 2

Texas Securities Act (Blue Sky Law), TEX. REV. CIV. STAT. ART. 581-4N ..... *passim*

TEX. GOV'T CODE 311.011(a) 9, 10

TABLE OF AUTHORITIES – Continued

Page

No-Action Letters of the Securities and Exchange Commission (SEC)

Letter to Joseph P. Canouse, 1977 WL 10657 (May 26, 1977) 14, 15, 16

Letter to J.H. Rodgas, Jr., 1974 WL 10941 (Sept. 7, 1974) 16, 17

Letter to David A. Umstead, 1976 WL 12176 (Aug. 13, 1976) 17

RULES OF COURT

Sup. Ct. Rule 13(1) 2

OTHER

MERRIAM-WEBSTER ONLINE DICTIONARY (2009) 11

WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1972 ed.) 11

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11

PETITION FOR WRIT OF CERTIORARI

Petitioners, S&D Trading Academy, LLC, a Texas limited liability company, and S&D Global Trading, Inc., a Texas corporation ("Petitioners"), seek this Court's review of the Opinion issued by the Court of Appeals for the Fifth Circuit. App. 1-23.

OPINION AND JUDGMENT BELOW

The Opinion and Order of the United States District Court for the Southern District of Texas, Galveston Division, dismissing Petitioners' case, was filed June 3, 2008. It is unpublished, but appears in electronic format at 2008 WL 2325167 in Westlaw. It appears herein as App. 24-26.

The Opinion of the Fifth Circuit Court of Appeals, July 1, 2009, affirming the judgment below, was not selected for publication in West's Federal Reporter but appears in electronic format at 2009 WL 1885881 in Westlaw. It appears herein as App. 1-23.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit issued its per curiam opinion on July 1, 2009. App. 1-23. No motion for rehearing or petition for rehearing en banc was filed in the Court of Appeals. The Supreme Court possesses jurisdiction under 28 U.S.C. § 1254 because

this Petition for Writ of Certiorari was filed within ninety (90) days following the issuance of the final decision of a United States Court of Appeals. 28 U.S.C. § 1254; Sup. Ct. Rule 13(1). The decision below wholly involves the interpretation of a Texas state statute which mirrors a United States statute, and in interpreting the state statute, both the District Court and the Court of Appeals interpreted and applied federal authorities that interpret the United States statute.

STATUTORY PROVISIONS INVOLVED

The District Court and the Fifth Circuit Court of Appeals decided this case solely on the basis of an exception contained in article 581-4N of the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N. The Texas statute is closely modeled after the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 – 80b-21, a federal statute that accordingly mirrors the Texas legislation.

Because the federal and state securities acts are lengthy, and this Petition involves a narrow portion of them, only the relevant portions of the statutes are set forth herein.

1. Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N. The Texas Securities Act defines "investment adviser" as follows:

> N. "Investment adviser" means a person who, for compensation, engages in the business of advising another, either directly or through publications or writings, with respect to the value of securities or to the advisability of investing in, purchasing, or selling securities or a person who, for compensation and as part of a regular business, issues or adopts analyses or a report concerning securities. . . . *The term does not include*: . . .
>
> > (2) a lawyer, accountant, engineer, *teacher, or geologist whose performance of the services is solely incidental to the practice of the person's profession*. . . .

Id. at art. 581-4N (emphasis added). The Texas statute does not define the term "teacher."

2. The federal Investment Advisers Act, 15 U.S.C. §§ 80b-1 – 80b-21. The federal Investment Advisers Act of 1940, Act of August 22, 1940, 54 Stat. 847, 15 U.S.C. §§ 80b-1 – 80b-21, defines "investment adviser" as follows:

> (11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; *but does not include* . . .

> (B) any lawyer, accountant, engineer, or *teacher whose performance of such services is solely incidental to the practice of his profession*. . . .

Id. § 80b-2(a)(11) (emphasis added). The federal act does not define the term "teacher."

I. INTRODUCTION

Both the State of Texas and the federal government have securities acts that require investment advisers to register with the proper authorities. The acts each contain an exception for persons engaged in certain types of activities. One of these exceptions is for someone who is a "teacher." Neither act specifically defines the term "teacher," however, and federal courts often look to opinion letters of the Securities and Exchange Commission (SEC) to interpret the federal act.

The issue raised by this Petition is the scope of the teacher exception to the investment adviser requirement that is found in the Texas Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, and by implication, the same provisions of the parallel federal Investment Advisers Act of 1940, 15 U.S.C. § 80b-15(b). Each statute contains a "teacher exception" that is for all intents and purposes identical. The lower courts based their decisions solely on the teacher exception contained in the Texas Securities Act, and the opinion of the Fifth Circuit Court of Appeals relied exclusively on no-action letters of the Securities and Exchange

Commission which are often used to interpret the federal act. Thus, the appellate opinion (App. 1-23) is also an interpretation of the federal authorities construing the federal act, and as such warrants this Court's attention.

As shown herein, both lower courts interpreted the teacher exception far too narrowly and restrictively, resulting in injustice under the facts of this case.

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

The Opinion of the Fifth Circuit Court of Appeals, App. 1-23, generally states the underlying facts. This Petition concerns the proper interpretation of a statutory term.

In early 2005, AAFIS approached Donald J. Cleary about giving training on the day trading of stocks. AAFIS, a Los Angeles based investment company, is an active trader in the United States stock markets. It employs a company based in China called Asian American Association, Shen Yang, Limited Liability Company ("ASY"). ASY employs Chinese citizens to trade on AAFIS's account, but ASY's employees first need to be trained. Cleary was to train 28 of ASY's Chinese traders. Cleary recruited Robert Compher to assist him with the training. Those two formed S&D Trading Academy, LLC and S&D Global Trading, Inc., through which they would provide their services to AAFIS. App. 2.

S&D entered into an oral agreement with AAFIS to train the ASY employees. S&D would receive a base compensation of one dollar for every thousand shares traded during a six-month probationary period and for up to 36 months thereafter. Bonus compensation would be based on the profits generated by the traders. Training occurred both in Texas and China. While in Texas, S&D performed most of its training in an apartment furnished with tables and computers; the Chinese traders both worked and lived there. The training consisted of Cleary's and Compher's monitoring the live, on-line trading activities of the ASY employees. Cleary and Compher provided such training for a continuous period of approximately 16 months. App. 3.

Petitioners were hired to act as teachers and were doing so when they provided their services to AAFIS. Mitch Cariaga was a consultant for AAFIS who helped develop AAFIS's on-line trading business. He served as the contact between AAFIS and the Petitioners. Cariaga was tasked to teach other people to learn how to do on-line trading. He located Petitioners and had them train AAFIS workers. As shown by the testimony of one of AAFIS's representatives, any financial services that Petitioners may have provided to AAFIS were solely incidental to their work as *teachers* of day trading. Petitioners were not acting as "investment advisers" as that term is defined under relevant Texas law but rather as teachers of day trading, and thus, they were not required by

the Texas Securities Act to register as such. Cf. App. 25-26.

During the training, neither S&D nor Cleary nor Compher held state or federal registrations or licenses as investment brokers. App. 4, 25.

The training began without a written agreement between S&D and AAFIS. The parties reached an impasse in their negotiations of a written contract. AAFIS terminated its oral contract with S&D, Cleary, and Compher, effective October 2006. S&D had been paid periodically for its work, but was due additional compensation. App. 4.

In November 2006, S&D filed suit against AAFIS, alleging breach of contract and misappropriation of trade secrets. S&D later amended its complaint, dropping the trade secrets claim and adding claims for quantum meruit, unjust enrichment, and money had and received. App. 4.

In April 2008, AAFIS moved for summary judgment, alleging S&D's failure to register as an investment adviser or broker/dealer with state and federal authorities precluded it from recovering under the oral agreement between the parties. S&D responded that it was not a broker/dealer and that it qualified under a "teacher" exception to the investment adviser registration requirements. S&D showed that (1) any broker-type work it engaged in was wholly incidental to its work as teachers, (2) it did not engage in the business of brokering, and (3) it did not receive any transaction based compensation. App. 4.

The District Court granted AAFIS's motion for summary judgment because S&D had failed to register as an investment adviser as required by the Texas Securities Act. App. 25-26. The District Court rejected S&D's contention that it fit into the teacher exception. *Id.* The District Court looked to a single Securities and Exchange Commission no-action letter from 1977, which interpreted an almost identical exception to the investment adviser provision of the federal Investment Advisers Act. It concluded that the teacher exception "only covers actual teachers who work for accredited and certified institutions or schools of higher learning." S&D did not qualify. App. 26, 5.

The District Court entered a final judgment in favor of AAFIS on June 3, 2008, awarding costs for defending the action. App. 27. AAFIS submitted a bill of costs. The District Court clerk originally taxed S&D with the full amount of costs requested; however, S&D objected, arguing that AAFIS should not recover the costs of obtaining six video depositions. Following a hearing, the District Court disallowed the extra costs, awarding costs at a lower amount than originally requested. App. 27, 5.

Both parties timely appealed, S&D as to the court's summary judgment and AAFIS regarding the award of costs. Their appeals were consolidated. App. 5.

In an unpublished opinion dated July 1, 2009, the Fifth Circuit Court of Appeals affirmed the District Court's decision that the teacher exception of the

Texas act did not apply to Petitioners, and affirmed the District Court's decision regarding the payment of costs. App. 1-23.

This Petition does challenge the Fifth Circuit Court of Appeals's affirmation of the award of costs.

III. REASONS FOR GRANTING WRIT

This Court should grant the writ of certiorari for the following reasons:

Issue 1: The Fifth Circuit Court of Appeals erred in interpreting the teacher exception contained in the Texas State Securities Act, TEX. REV. CIV. STAT. ART. 581-4N, because its narrow and restrictive interpretation of the state statute directly contravened Texas state law rules of statutory construction.

The Texas state securities act mandates that a teacher, whose performance of investment services is "solely incidental to the practice of [his] profession" need not register as an investment adviser. TEX. REV. CIV. STAT. ART. 581-4N. The Texas Act does not define the term "teacher."

Under Texas state law, the statutory term "teacher" must be given its ordinary meaning as required by Texas statute. This is mandatory given the fact that the statute fails to define the term. TEX. GOV'T CODE 311.011(a) ("Words and phrases shall be

read in context and construed according to rules of grammar and common usage."); *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 925 (Tex. 2008) (applying Section 311.011, noting that statutory terms "that are not otherwise defined are typically given their ordinary meaning."); *Marks v. St. Luke's Episcopal Hosp.*, ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 1184, 2009 WL 2667801 (Tex. Aug. 29, 2009) ("When interpreting a statute, we read words and phrases in context and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE § 311.011(a). Words that are not defined are given their ordinary meaning."). When the state legislature fails to define a word or term, courts will apply its ordinary meaning. *See Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993); *Marks*, 52 Tex. Sup. Ct. J. 1184, 2009 WL 2667801.

When applying the ordinary meaning, courts applying Texas law may not by implication enlarge the meaning of any word beyond its ordinary meaning. *Monsanto Co.*, 865 S.W.2d at 939. "It is inappropriate for courts to enlarge the meaning of any word in a statute beyond its plain and ordinary meaning by implication when legislative intent may be gathered from a reasonable interpretation of the statute as it is written." *Energy Service Co. of Bowie, Inc. v. Superior Snubbing Services, Inc.*, 236 S.W.3d 190, 198 (Tex. 2007), citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994).

In determining the ordinary meaning of an undefined term, Texas courts have consulted the term's common law usage, interpretation when used in other statutes, and definitions in secondary sources. *See, e.g., Monsanto Co.*, 865 S.W.2d at 938-40 (common-law usage); *Little v. State*, 246 S.W.3d 391, 400-01 (Tex. App. – Amarillo 2008, no pet.) (common-law usage and construction in other statutes); *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 344 (Tex. App. – Austin 1995, no writ) (using definition found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

In this case, both the District Court and the Fifth Circuit Court of Appeals both improperly enlarged the meaning of the word "teacher" beyond its ordinary meaning. This contravenes Texas law. The common understanding of the word "teacher" does not include the concept of being on staff at a college or university. As defined in WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1972) "teacher" means "a person who teaches, esp. as a profession; instructor." Similarly, the MERRIAM-WEBSTER ONLINE DICTIONARY (accessed September 2009) defines the word "teacher" as "one who teaches; especially, one whose occupation is to instruct." As understood in common, ordinary usage, the word "teacher" describes someone who teaches, especially someone whose occupation is instructing. A "teacher" need not be a professor or lecturer at an accredited, certified institution of higher learning, college or university. Had the Texas Legislature intended such a

requirement, it would have used the word "professor" instead of the word "teacher," or would have provided a definition for the term teacher that specifically states that a "teacher" for the purpose of the statute is one who teaches at an accredited, certified institution of higher learning, college or university.

Because the Texas Legislature did not define the term "teacher" in the Texas Securities Act, the Fifth Circuit Court of Appeals erred in failing to apply the ordinary definition of the term "teacher" as it appears therein. The ordinary understanding of the term "teacher" encompasses all persons who instruct, and thus, the term should properly encompass the activities of Petitioners who were serving as *teachers* – not brokers or investment advisers. Any broker or adviser type work S&D performed was wholly incidental to its teaching role. To the degree that Texas courts may look to decision of federal courts to interpret the Texas Securities Act due to the statutory similarities, *see Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992), Petitioners demonstrate below that the cited federal authorities are inapposite. As such, the Court of Appeals erred in its construction of the teacher exception to the Texas Securities Act, and this Court should grant writ to correct the Fifth Circuit Court of Appeals's misapplication of Texas statute.

Issue 2: The Fifth Circuit Court of Appeals erred to the degree that it gave the "teacher exception" a narrow, restrictive construction, relying solely on SEC opinion letters which interpreted the federal Investment Advisers Act.

As seen, under the federal Investment Advisers Act of 1940, the requirement to register as an investment adviser does not apply to a teacher or other professional "whose performance of the services is solely incidental to the practice of the person's profession." 15 U.S.C. § 80b-2(a)(11). Although the lower courts did not decide this case on the basis of the federal act, *per se*, they nevertheless relied solely on underlying federal interpretative authorities (i.e., SEC no-action letters) and defined the word "teacher" as used in the Texas Act based on these letters. In reaching this conclusion, both lower courts gave an overly narrow and constraining interpretation to the term "teacher" due to their reliance on these letters.

A. The three SEC no-action opinion letters are poor yardsticks of statutory interpretation in this case

The three authorities relied on by the Fifth Circuit Court of Appeals are opinion letters of the Securities and Exchange Commission (SEC). App. 1-16. There appear to be no federal *judicial* opinions that directly address the scope of the "teacher" exception to the federal Investment Advisers Act of 1940. While federal courts may consider SEC no-action

letters as persuasive authority regarding the proper interpretation of the federal act, the no-action letters are binding on neither federal courts nor the Securities and Exchange Commission itself. *See Allarie Corp. v. Okumus*, 433 F.3d 248, 254 (2nd Cir. 2006) ("The SEC no-action letter does not bind us, but we find it persuasive."), citing *Mony Group, Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 146 (2nd Cir. 2004) (no-action letters may be relied upon for their persuasiveness). While perhaps persuasive, the no-action letters are not binding even as to the federal act. *Id.*

As shown herein, the Court of Appeals's use of the SEC no-action letters is problematic for several reasons; this case presents the opportunity for the federal judiciary to craft a fair, workable definition of the term "teacher" as it is used in the relevant acts.

1. Canouse opinion letter

The Court of Appeals relied upon a 1977 Securities and Exchange Commission agency no-action letter. Letter to Joseph P. Canouse, 1977 WL 10657 (May 26, 1977). App. 11-12. This was the only authority cited by the District Court. App. 26. The Court of Appeals believed that the Canouse no-action letter mandates a narrow definition of the term "teacher" – one that would effectively restrict the term to university or college professors; however, the Canouse opinion letter is not a judicial determination of the term's scope. The letter simply observed:

> *Among the factors we have in the past considered* in deciding whether an individual is eligible for this exclusion are whether his compensation for teaching is paid by an educational institution, whether the course he is teaching is part of a program regularly offered by an educational institution, whether the school or institution is accredited, and the manner in which the course is offered to the public.

1977 WL 10657 (emphasis added); App. 12. Teachers at a university are certainly *one example* of a "teacher," but they are not the only example. The Canouse letter does not purport to be an exhaustive survey of teacher status. Moreover, the no-action letter candidly admits, "Moreover, your letter *does not indicate any facts that would qualify your client for any of the exemptions from registration* set forth in Section 203(b) of the Act." (emphasis added). Mr. Canouse's letter of inquiry which resulted in the SEC's opinion letter was two-paragraphs in length and perfunctory:

> Gentlemen:
>
> A client of mine wishes to teach individuals how to invest in the stock market and charge so much per lesson. He would not issue any newsletter or periodical advisory letters – merely instruct individuals on the various market timing devices – Dow Jones theory, etc.
>
> Please advise if there are any regulations governing how to invest in the market.

> If there are, please send me two sets of any rules or regulations involved.
>
> Sincerely,
>
> J.P. Canouse

The less-than-thorough presentation of facts in Canouse strongly militates in favor of a federal court being allowed to determine the definition of the statutory word "teacher," and the scope of the teacher exception, for itself as developed through adversarial litigation.

2. Rodgas opinion letter

The Court of Appeals cited another SEC no-action letter, J.H. Rodgas, Jr., 1974 WL 10941 (Sept. 7, 1974), as authority for a narrow interpretation of the teacher exception under the federal act. App. 12-13. Although the SEC did observe that a "teacher" was normally associated with an educational institution, the SEC expressed equal concern with the fact that the proposed teaching was being offered to the general public through a newspaper:

> . . . it appears that the inducement to be offered by SMT to potential students is the ability to use the course in a manner that will enable them to profit from investments in securities. For instance, *the newspaper advertisement states that 'the stage is set now FOR A GREAT UPSURGE in stock prices – we believe it will be soon' and 'or will you wait until everyone else is buying and join the*

> *stampede to buy after the real bargains are gone.*' The whole thrust of SMT's proposed advertising appears to be an attempt to sell SMT's course to the public for use by them in making their own investment decisions. Even its descriptive label at the top of the newspaper advertisement and on the cover of the brochure states that SMT is 'a course in investing and trading in the stock market for capital gains.'

1974 WL 10941 (emphasis added). In contrast, there was no evidence presented in this case that Petitioners advertised their services to the general public, via newspaper or any other medium, but were solicited to provide teaching services. The Rodgas no-action letter is therefore distinguishable, and the Court of Appeals's reliance upon it is less than persuasive. App. 12-13.

3. Umstead opinion letter

Finally, the Court of Appeals cited a 1976 no-action letter, to David A. Umstead, 1976 WL 12176 (Aug. 13, 1976) as additional support for the proposition that the teacher exception contained in the Texas statute has a narrow, restrictive scope. App. 13-15. In Umstead, the no-action letter made clear that the proposed seminar was outside the normal scope of instruction at the Whatron School and that it was "being offered to the public not primarily as an educational experience, but rather for the purpose of influencing investment decision making. . . ." *Id.*

Petitioners did not attempt to influence investment decision making. They simply taught day trading. Once again, the factual dissimilarities and relative terseness of the SEC's no-action letter makes it a poor guide for defining statutory intent. A federal court should be allowed to determine the definition of the statutory word "teacher" and the scope of the teacher exception for itself through adversarial litigation.

B. The record confirms that Petitioners were not acting as brokers and did not receive transaction based compensation, reinforcing the fact that they were indeed teachers who did not require registration.

This case demonstrates the inherent unfairness in defining the statutory term "teacher" so narrowly as to effectively restrict it to college and/or university professors. The record confirms that Petitioners were acting first and foremost as teachers – not brokers – and that any regulated activity in which they may have engaged was incidental to their role as teachers.

Under the Securities Exchange Act of 1934 ("SEC Act"), the "term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The statutory phrase, "engaged in the business" is not defined by the SEC Act. However, cases interpreting the phrase have indicated that regularity of participation in securities transactions is a primary indicia of being "engaged in the business." *See, e.g., SEC v.*

Margolin, 1992 WL 279735 (S.D.N.Y. 1992), citing *Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp.*, 411 F. Supp. 411, 415 (D. Mass. 1976). Regularity of participation has been established by factors such as the dollar amount of securities sold. *See SEC v. National Executive Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) ($4.3 million of securities sold); *UFITEC, S.A. v. Carter*, 20 Cal.3d 238, 142 Cal.Rptr. 279, 571 P.2d 990 (1977) (several million dollars of securities sold); and the extent to which advertisement and investor solicitation were used, *see SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997) (substantial solicitation occurred).

A person effects transactions in securities if he or she participates in such transactions "at key points in the chain of distribution." *Massachusetts Fin. Servs.*, 411 F. Supp. at 415; *see also National Executive Planners, Ltd.*, 503 F. Supp. at 1073. Factors indicating that a person is "engaged in the business" of a broker include, among others, regular participation in securities transactions, employment with the issuer of the securities, payment by commission as opposed to salary, a history of selling the securities of other issuers, involvement in advice to investors and active recruitment of investors, receiving transaction-related compensation, holding one's self out as a broker, and executing trades, or assisting others in settling securities transactions. *See SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005).

As shown, cases treat "being engaged in the business" as being a key component of being a broker,

yet this record does not show Petitioners were brokering transactions or acting as brokers. In response to Respondent's motion for summary judgment, Petitioners demonstrated that they were *not* engaged in the business of effecting transactions in securities for others. As such, the restrictive definition of the term "teacher," which forecloses Petitioners from relying upon the teacher exemption, is unjust. There is no evidence that Petitioners assisted any issuer in structuring prospective securities transactions, identifying potential purchasers of securities, soliciting securities transactions or participating in the order-taking or order-routing process. There is no evidence that Petitioners held themselves out as brokers, as persons who executed trades, or as persons who helped others settle securities transactions. There is no evidence that Petitioners received transaction-based compensation. Any work that Petitioners may have conducted was an integral part of their teaching. The Texas Securities Act does not require registration of a person whose performance of otherwise covered activities is "solely incidental to the practice of the person's profession." TEX. REV. CIV. STAT. ART. 581-4N. Accordingly, denying Petitioners access to the teacher exception to registration is unfair and violative of the public policy reflected in the statutes.

Given this record, Petitioners should properly be regarded as "teachers" who did not need to register as investment advisers under either the Texas or federal investment advisers acts. This Court should use this case as an opportunity to fashion a judicial definition

of the term "teacher" that fairly takes into account the actual activities of individuals.

CONCLUSION

This Court should exercise its discretion and grant the writ of certiorari to review this case, which presents an issue of statutory interpretation under Texas state law, in which the opinions below apply exclusively federal authorities. The decision of the Fifth Circuit Court of Appeals should be reversed, and the case remanded to the District Court for further proceedings in accordance herewith. Petitioners request all relief to which they may be justly entitled.

Respectfully submitted,

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2009 WL 1885881

United States Court of Appeals,
Fifth Circuit.

S & D TRADING ACADEMY, LLC;
S & D Global Trading Inc, Plaintiffs-Appellants
v.
AAFIS INC, Defendant-Appellee
S & D Trading Academy, LLC;
S & D Global Trading Inc, Plaintiffs-Appellees
v.
AAFIS Inc, Defendant-Appellant.
Nos. 08-40711, 08-40776.

July 1, 2009.

Marc Evan Kutner, James Thomas Liston, Spagnoletti & Company, Houston, TX, for Plaintiffs-Appellants.

Ben C. Broocks, Mark L. Walters, Jackson Walker, Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 3:06-CV-739.

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

S & D Trading Academy, LLC and S & D Global Trading, Inc. (collectively, "S & D") appeal the district court's grant of summary judgment in favor of AAFIS, Inc. on S & D's contractual and quasi-contractual claims. AAFIS cross-appeals regarding the award of costs. For the reasons that follow, we AFFIRM the district court's ruling with respect to each issue.

I. BACKGROUND

In early 2005, AAFIS approached Donald J. Cleary about giving training on the day trading of stocks. AAFIS, a Los Angeles based investment company, is an active trader in the United States stock markets. It employs a company based in China called Asian American Association, Shen Yang, Limit Liability Company ("ASY"). ASY employs Chinese citizens to trade on AAFIS's account, but ASY's employees first need to be trained. Cleary was to train twenty-eight of ASY's Chinese traders. Cleary recruited Robert Compher to assist him with the training. Those two formed S & D Trading Academy, LLC and S & D Global Trading, Inc., through which they would provide their services to AAFIS.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

S & D entered into an oral agreement with AAFIS to train the ASY employees. S & D would receive a base compensation of one dollar for every thousand shares traded during a six-month probationary period and for up to thirty-six months thereafter. Bonus compensation would be based on the profits generated by the traders. Training occurred both in Texas and China. While in Texas, S & D performed most of its training in an apartment furnished with tables and computers; the Chinese traders both worked and lived there. The training consisted of Cleary and Compher's monitoring the live, online trading activities of the ASY employees while also trading on their own accounts.[1] Cleary and Compher further provided the employees with market research, stock recommendations, and trading strategies at the beginning of each trading day. And they set the "stop loss" for each trader, which was the maximum loss a trader could sustain before the trader was required to exit the market for the day. Cleary and Compher provided such training for a continuous period of approximately sixteen months. During the training, neither

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[1] AAFIS submits that during the trading hours, Cleary and Compher would have the traders who were not sitting at computers beside them tell them when the traders "got into a trade" so that Cleary and Compher could review the trade and give feedback regarding the transaction. The traders sitting beside Cleary and Compher on any given day received more intense instruction. AAFIS explains that Cleary and Compher would watch these traders more closely and would provide advice prior to the traders entering into a particular trade. These traders could also see the trades Cleary and Compher made.

S & D nor Cleary nor Compher held any state or federal registrations or licenses.

The training began without a written agreement between S & D and AAFIS. The parties reached an impasse in their negotiations about a contract. AAFIS terminated its arrangement with S & D, Cleary, and Compher, effective October 2006. S & D had been paid periodically for its work, but it believed additional compensation was due. In November 2006, S & D filed suit against AAFIS, alleging breach of contract and misappropriation of trade secrets. S & D later amended its complaint, dropping the trade secrets claim and adding claims for quantum meruit, unjust enrichment, and money had and received.

In April 2008, AAFIS moved for summary judgment. It alleged that S & D's failure to register as an investment adviser or broker/dealer with the proper state and federal authorities precluded S & D from recovering under the oral agreement between the parties. S & D responded that it was not a broker/dealer and that it qualified under a "teacher" exception to the investment adviser registration requirements.

The district court agreed with AAFIS and granted its motion for summary judgment solely because S & D had failed to register as an investment adviser as required by the Texas Securities Act. The court rejected S & D's contention that it fit into an exception to the statute's registration requirement for teachers. The court looked to a Securities and Exchange Commission no-action letter. That letter interpreted an

almost identical exception to the investment adviser provision of the federal Investment Adviser Act. It concluded that the teacher exception "only covers actual teachers who work for accredited and certified institutions or schools of higher learning." S & D did not qualify.

The court entered a final judgment in favor of AAFIS in June 2008, awarding costs for defending the action. AAFIS submitted a bill of costs. The district court clerk originally taxed S & D with the full amount of costs requested. However, S & D filed an objection to the bill of costs, arguing that AAFIS should not recover the costs of obtaining six video depositions. Following a hearing on the issue, the district court disallowed the video deposition costs and awarded costs at a lower amount than originally requested.

Both parties timely appealed, S & D as to the court's summary judgment and AAFIS regarding the award of costs. Their appeals have been consolidated.

II. DISCUSSION

A. Investment Adviser Registration

We review a grant of summary judgment *de novo*, applying the same standard as the district court. *Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642, 645 (5th Cir.2008). Summary judgment is proper when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there

is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A district court's summary judgment may be affirmed on any ground that was raised below and is supported by the record. *Aryain v. Wal-Mart Stores Tex. LP,* 534 F.3d 473, 478 (5th Cir.2008).

The Texas Securities Act, also known as a "Blue Sky Law," provides that "a person may not, directly or through an investment adviser representative, render services as an investment adviser in this state unless the person is registered under this Act . . . or is otherwise exempt under this Act." Tex.Rev.Civ. Stat. Ann. art. 581-12B. It further states that

> [n]o person who has made or engaged in the performance of any contract in violation of any provision of this Act or any rule or order or requirement hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

Id. at art. 581-33K. Thus, an unregistered individual or entity providing investment adviser services may not legally enforce a contract entered into regarding the provision of such services.

The Texas Securities Act defines "investment adviser" as follows:

> a person who, for compensation, engages in the business of advising another, either directly or through publications or writings, with respect to the value of securities or to the advisability of investing in, purchasing, or selling securities or a person who, for compensation and as part of a regular business, issues or adopts analyses or a report concerning securities. . . . The term does not include:
>
> . . .
>
> (2) a lawyer, accountant, engineer, *teacher,* or geologist whose performance of the services is solely incidental to the practice of the person's profession. . . .

Id. at art. 581-4N (emphasis added). It does not, however, include a definition of the term "teacher."

The Investment Adviser Act of 1940, a federal statute, similarly requires the registration of investment advisers and provides that "[e]very contract made in violation of any provision of this subchapter . . . , the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subhcapter [sic], or any rule, regulation, or order thereunder, shall be void. . . ." 15 U.S.C. § 80b-15(b). Like the Texas Act, the Investment Adviser Act defines "investment adviser" as

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings

> as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (B) any lawyer, accountant, engineer, or *teacher* whose performance of such services is solely incidental to the practice of his profession. . . .

Id. § 80b-2(a)(11) (emphasis added). The federal Act, however, exempts from its registration requirement an "investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business, . . . unless the investment adviser . . . has assets under management of not less than $25,000,000. . . ." *Id.* § 80b-3a(a)(1). "'[A]ssets under management' means the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services." *Id.* § 80b-3a(a)(2).

S & D maintains that the district court erred in concluding that it was required to register as an investment adviser under the Texas Securities Act. It contends that any investment advising services it provided under its agreement with AAFIS were solely incidental to its primary purpose of teaching AAFIS's employees how to day trade on the New York Stock Exchange, and it therefore qualified for the teacher exception to the investment adviser registration requirement.

Initially, S & D attacks the basis for the district court's decision. It notes that the sole authority that the court cited is an SEC no-action letter from 1977, which is not binding with respect to the proper interpretation of a Texas statute. S & D submits that reversal is appropriate because the court relied exclusively on a federal, administrative-level opinion interpreting the federal rather than the Texas statute. S & D explains that even though the position of the administrative agency charged with enforcement of a statute is entitled to substantial weight, it is not conclusive. Furthermore, S & D points out that the court's reliance on federal authority deprives the Texas courts of the opportunity to develop their own definition of the teacher exception.

Rather than relying on the no-action letter, S & D maintains that the district court should have simply given the term "teacher" its common meaning. S & D submits that a Texas statute requires that terms not otherwise defined in a statute be given their ordinary meaning. Section 311.011 of the Texas Government Code provides: "(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Moreover, cases applying Section 311.011 have stated that statutory terms "that are not otherwise defined are typically given their ordinary meaning." *Guitar Holding Co., L.P. v.*

Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910, 915 (Tex.2008).

Citing an online dictionary, S & D concludes that the common usage of the word "teacher" is to describe someone who teaches, and especially someone whose occupation is instructing. It argues that a teacher need not be a professor or lecturer at an accredited and certified institution of higher learning. S & D suggests that if the legislature had intended such a requirement, it would have used the word "professor" instead of the word "teacher."

Although there is no authority construing the Texas provision, there are a number of SEC no-action letters concerning the teacher exception to the federal investment adviser statute. S & D is correct that these are not controlling authority regarding the meaning of the Texas exception. However, the Texas provision is nearly identical to its federal counterpart, which was promulgated nearly sixty years earlier.

Moreover, because there is very little authority interpreting the Texas provision itself, the "Texas courts generally look to decisions of the federal courts to interpret the Texas Securities Act because of the obvious similarities between the state and federal laws." *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir.1992) (citing *Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex.App.-San Antonio 1984, no writ)). Indeed, the Texas Supreme Court has explained that the Texas legislature intended the Texas Securities Act "to be interpreted in harmony with federal securities

law." *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840 (Tex.2005). The Act itself states that it "may be construed and implemented to effectuate its general purpose to maximize coordination with federal and other states' law and administration, particularly with respect to . . . exemptions." Tex.Rev.Civ. Stat. Ann. art. 581-10-1A. Finally, though no-action letters are not binding on the courts or the SEC, federal courts may consider them persuasive authority regarding the proper interpretation of the federal provision. *See Allaire Corp. v. Okumus*, 433 F.3d 248, 254 (2d Cir.2006).

Whatever our decision here, the Texas courts obviously retain their authority to define ths [sic] state statutory term differently. We proceed to define it based on what is available for our consideration.

In the SEC no-action letter relied on by the district court, an attorney sought to determine the regulations governing a client who wished "to teach individuals how to invest in the stock market and charge so much per lesson." Joseph P. Canouse Esquire, SEC No-Action Letter, 1977 WL 10657, at *1 (July 15, 1977). The client did not plan to issue newsletters or advisory letters, but merely intended to "instruct individuals on the various market timing devices – Dow Jones theory, etc." *Id.* In response to the inquiry, the Commission explained the scope of the teacher exception to the investment adviser registration requirement as follows:

> Among the factors we have in the past considered in deciding whether an individual is eligible for this exclusion are whether his compensation for teaching is paid by an educational institution, whether the course which he is teaching is part of a program regularly offered by an educational institution, whether the school or institution is accredited, and the manner in which the course is offered to the public.

Id. The Commission concluded that based on the information contained in the attorney's letter, it appeared that his "client's proposed activities would place him within the definition of investment adviser" and that the teacher exception would not be available to him. *Id.*

In another no-action letter, an individual was planning to start a "stock market school" and requested guidance regarding whether he was required to register with the SEC. J.H. Rodgas, Jr., SEC No-Action Letter, 1974 WL 10941, at *1 (Sept. 7, 1974). The school was described as follows:

> [T]he course will be completely and purely instructional in concept and execution. Students will never be advised to buy or sell securities or to commit funds to any kind of investment. . . . We will teach them where to find and how to [e]valuate available information but emphasize that the final decision to buy or sell must be theirs alone. . . . In summary, our planned course of instruction is not an advisory service and no promises or

> predictions as to performance of any stock or group of stocks will ever be made to students. Instead, the students will be shown all of the various forces acting on the market, will be taught how to identify and evaluate those forces and will be shown how to make their own evaluations and their own market decisions.

Id. The Commission determined that the school would qualify as an investment adviser and therefore would be required to register before engaging in its proposed activities. *Id.* at *4. Furthermore, the teacher exception would not apply because the school did not "appear to have the attributes normally associated with an educational institution." *Id.* The Commission noted that there was no indication that the school had been approved by an authorized state or federal agency or that it was an accredited educational institution. *Id.* Moreover, the inducement offered by the school to potential students was "the ability to use the course in a manner that will enable them to profit from investments in securities." *Id.*

The SEC again emphasized the narrow scope of the teacher exception in a no-action letter involving an assistant professor of finance at the Wharton School. He asked the SEC for a ruling regarding whether he was required to register as an investment adviser for conducting a series of investment strategy seminars for extra money. David A. Umstead, SEC No-Action Letter, 1976 WL 12176, at *1 (Aug. 13, 1976). The one-day seminars that he intended to teach

included a discussion of the theoretical development of investment strategy and a general description of the different kinds of investment securities. *Id.* "In summary, the overall intent of the course [was] to build an analytical framework for making long run investment decisions and to make a general assessment of the current opportunities available in the securities markets." *Id.* It was not "a course of 'hot tips' with up to the minute assessments on individual securities." *Id.* The Commission concluded that teaching this course would constitute acting as an investment adviser and therefore required a registration. *Id.* at *2. Furthermore, the teacher exception would not apply for a number of reasons. *Id.* First, compensation for the seminars would be separate and in addition to the usual teaching salary. *Id.* Second, although participants in the seminar would receive certificates from the Wharton School, there was no indication that the course was a "part of the regular curriculum of study offered at that institution." *Id.*[2]

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[2] *See also* Walter H. Shapiro, SEC No-Action Letter, 1978 WL 11703, at *2 (July 26, 1978) ("We have construed the term 'teacher' to mean a person who is a member of the teaching profession[,] and we have considered advisory services performed by a teacher to be solely incidental to the practice of a teacher's profession, and, thus, not to cause the teacher to come within the definition of investment adviser, when they are rendered in the course of instruction in a study which is given under the auspices of an academic institution."); Frank T. Hines, SEC No-Action Letter, 1972 WL 8250, at *1 (Aug. 21, 1972) (responding to a question regarding whether SEC registration would be required to conduct a college course in stock market strategy, the Commission explained, "we would be happy to consider a

(Continued on following page)

Finally, the investment course was "being offered to the public not primarily as an educational experience, but rather for the purpose of influencing investment decision making and assisting participants to maximize profits for their investments. . . ." *Id.*

The SEC no-action letters construing the federal provision are persuasive. We conclude that the teacher exception does not apply to the training provided by S & D. Neither Cleary nor Compher were professional teachers. They were not associated with an accredited school or course, and their training was not part of a program regularly offered by an educational institution. Moreover, their training was not academic in nature. They provided the traders with market research, stock recommendations, and trading strategies for a particular day or particular stock. The goal of the training was to influence the investment decision making of the Chinese traders and to enable them to maximize their profits. Applying the teacher exception under these circumstances would allow almost any investment adviser to qualify for the exception so long as they accompanied their advice with a justifying explanation. This result would undermine the general purpose of the Texas Securities Act, which is "to protect investors." Tex.Rev.Civ. Stat. Ann. art. 581-10-1B.

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request for interpretation from an accredited institution which provides in detail a description of the course, and the background on the individuals who are conducting the course, including a brief description of their other academic responsibilities").

We are not convinced by S & D's argument that we should give the term "teacher" its plain and ordinary meaning. Although the Texas code contains a canon of interpretation suggesting that undefined words should be given their ordinary meaning, the definition S & D proposes is circular and imprecise. It makes a teacher anyone who teaches. Contrary to the cited canon, which states that words should be read in context, this proposed definition is divorced from the context of the Texas Securities Act and would contravene the overall purpose of the Act, as discussed above.

Because S & D does not qualify for the teacher exception and was not registered as an investment adviser as required under the Texas Securities Act, the district court properly granted summary judgment in favor of AAFIS on S & D's contractual and quasi-contractual claims. Because of this conclusion, we need not consider AAFIS's alternative arguments that summary judgment was proper for other reasons.

B. Award of Costs

A "district court has broad discretion in taxing costs, and we will reverse only upon a clear showing of abuse of discretion." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1049 (5th Cir.1998). Moreover, within its wide discretion, a district court may order each party to bear its own costs. *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216 (5th Cir.1991).

AAFIS argues that the costs it incurred in obtaining copies of videotaped depositions should be taxed against S & D. It admits that at the time of the district court's ruling on costs, controlling Fifth Circuit law precluded the recovery of such costs. *See Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 529-30 (5th Cir.2001); *Migis*, 135 F.3d at 1049. Nevertheless, AAFIS maintains that the statute upon which our prior cases were based has been amended, and it contends that we should retroactively apply the amendment to allow for video deposition costs in this case.

Prior to its recent amendment, the United States Code section dealing with the taxation of litigation costs provided that a judge or court clerk may tax the following items as costs:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2007). In light of Supreme Court precedent indicating that this provision should be

strictly construed, "absent explicit statutory or contractual authorization to the contrary," we have consistently held that the costs associated with videotaped depositions may not be awarded. *Mota,* 261 F.3d at 529-30 (referencing *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 444-45 (1987)). However, in October 2008, approximately three months after the costs award in this case, Congress passed the Judicial Administration and Technical Amendments Act of 2008, Pub.L. No. 110-406, 122 Stat. 4291, 4292. Section 1920(2) was amended to state that a judge may tax as costs "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2) (current version). There was no effective date listed for this amendment.

The Supreme Court has set forth the following framework for determining whether a statutory amendment may be applied retroactively. *See generally Landgraf v. USI Film Prods.,* 511 U .S. 244 (1994). "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* at 280. If the statute contains no express command, then "the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Also, if the statute

would have retroactive effect, then a presumption against retroactivity prevents the newly enacted statute from applying absent clear congressional intent otherwise. *Id.*

Regarding procedural rules, the Court further explained:

> [c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

Id. at 275. In a footnote, however, it explained that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n. 29. Instead, the applicability of new procedural rules may depend on the "posture of the particular case." *Id.*

AAFIS relies on one of the Supreme Court's pre-*Landgraf* decisions in asserting that we should apply the amended version of Section 1920(2) to award its video deposition costs in this case. *See Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696 (1974). In *Bradley*, the Court held that a statute allowing for the award of attorney's fees, which was enacted after the case was submitted to the Court of Appeals but before its decision, should be applied to the case on appeal. *Id.* at

724. The Court anchored its holding "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." *Id.* at 711.

In *Landgraf,* the Court reaffirmed its decision in *Bradley,* specifically noting that *Bradley* did not resemble the cases in which it had invoked the presumption against statutory retroactivity: "Attorney's fee determinations, we have observed, are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." *Landgraf,* 511 U.S. at 277 (internal quotation marks and citations omitted). AAFIS submits that taxable costs are similar to attorney's fees, also collateral to the cause of action and "uniquely separable from the cause of action to be proved at trial." Thus, the presumption against retroactivity should not apply, and the amendments to Section 1920(2) should be applied to determine the costs taxable in this suit.

However, AAFIS's argument is foreclosed by a decision from this court applying *Landgraf* and concluding that a provision allowing for the payment of expert witness fees as a court cost should not apply retroactively to a case pending on appeal at the time of the provision's enactment. *Shipes v. Trinity Indus.,* 31 F.3d 347, 347-48 (5th Cir.1994). In *Shipes,* we considered whether a section of the 1991 Civil Rights Act providing for payment of expert witness fees as a part of costs should apply retroactively to a case in which both the relevant conduct and the trial court's

ruling occurred before the effective date of the Act. *Id.* at 347. After noting that rules regarding attorney's fees are procedural and often subject to retroactive application, we cited *Landgraf* for the proposition that "when a procedural matter has been properly decided under the old rule, and a new procedural rule is subsequently enacted while the ultimate resolution of the case is still pending, no reversal is required." *Id.* at 349. We concluded that because the district court's decision denying expert witness fees was properly decided under the law applicable at the time, there was no reversible error. *Id.*

AAFIS submits that *Shipes* does not compel affirmance in this case because the taxability of video deposition costs was not settled at the time the district court entered its costs award. Although the case law in this circuit clearly held that the costs associated with video depositions were not taxable, AAFIS contends that this was a minority position not shared by five other circuits and numerous district courts. It suggests that given this split of authority, the amendment to Section 1920(2) was a clarification of the law, rather than a change in the law. Thus, we should apply the amended version of Section 1920(2), not as the retroactive application of a new law, but as the application of the law in effect at the time of the award.

AAFIS offers as support for this position an opinion from this court stating that "changes in statutory language need not *ipso facto* constitute a change in meaning or effect. Indeed, a legislative body may

amend statutory language to make what was intended all along even more unmistakably clear." *NCNB Tex. Nat'l Bank v. Cowden,* 895 F.2d 1488, 1500 (5th Cir.1990) (internal quotation marks and citations omitted). In *NCNB Texas National Bank,* we further observed that "the existence of a dispute in the courts, such as a circuit split, may suggest that Congress was provoked to enact an amendment to clarify rather than change the law," especially when there is no indication in the legislative history that Congress intended to change the law or there is no dispositive legislative history at all. *Id.* at 1500-01. We were not, however, deciding whether statutory amendments should be applied retroactively. Rather, we were considering whether recent amendments provided additional support for our interpretation of the pre-amendment version of a statute. *Id.* at 1499-1501. As such, *NCNB Texas National Bank* is inapposite here.

We conclude that *Shipes* is controlling. At the time the district court ruled, the costs associated with videotaped depositions were clearly not taxable under the law of this circuit. Because the district court properly decided the costs issue under the law applicable at the time, our decision in *Shipes* proscribes retroactive application of the amendments to Section 1920(2) in the present case. Accordingly, the district court did not abuse its discretion in denying AAFIS the costs associated with the videotaped depositions.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment and AFFIRM its award of costs.

2008 WL 2325167

United States District Court,
S.D. Texas,
Galveston Division.

S & D TRADING ACADEMY, LLC, et al.
v.
AAFIS INC., et al.
Civil Action No. G-06-739.

June 3, 2008.

Francis I. Spagnoletti, David S. Toy, Spagnoletti & Company, Houston, TX, for S & D Trading Academy, LLC, et al.

Ben C. Broocks, Mark L. Walters, Jackson Walker LLP, Austin, TX, Lionel M. Schooler, Jackson Walker LLP, Houston, TX, for Aafis Inc., et al.

OPINION AND ORDER

JOHN R. FROESCHNER, United States Magistrate Judge.

After full consideration of the Motion for Summary Judgment of Defendant AAFIS, Inc., the Court issues this Opinion and Order.

The facts relevant to the issue dispositive of the Motion can be almost entirely summarized by borrowing a sentence from the Plaintiffs' response: (Plaintiffs) "Donald J. Cleary ("Cleary") and Robert Compher ("Compher"), first as individuals, and then as principles of Plaintiffs S & D Trading Academy,

LLC. and S & D Global Trading, Inc., taught agents, servants or employees of Defendant AAFIS how to day trade stocks on the New York Stock Exchange." A few additional facts are of significance. First, in return for the teaching, Plaintiffs were to receive compensation of $1.00 for each 1,000 shares traded and a bonus of ⅓ of the net profits earned by each of the students they trained. Second, no Plaintiff, in any capacity, was ever registered as an Investment Advisor with either the Securities Exchange Commission (SEC) or the State of Texas during the performance of the underlying agreement.

Since the Plaintiffs concede that if they were required to be registered by either entity they are precluded from any recovery in this cause, the Court has confined its analysis to the sole issue of the registration requirement and, having read the Parties' submissions and authorities and having carefully evaluated their arguments, has concluded that, at the very least, the Plaintiffs were required to register as Investment Advisors with the State of Texas.

The Texas Securities Act forbids Investment Advisors from conducting business without first registering and nullifies any agreement to pay fees or commissions to an unregistered person or entity doing the business of an Investment Advisor. As AAFIS points out, the Plaintiffs, as part of their teaching regimen, "dispensed advise [sic] with respect to the value of securities, the advisability of purchasing or selling securities and market research." The Plaintiffs seem to concede that these actions clearly fall within

the definition of an Investment Advisor under Article 581-4(N), but, regardless, the Court finds that they do.

In their effort to avoid the preclusive effect of the Texas Act, Plaintiffs claim to fall within the "teacher" exception to registration contained in Article 581-4(N)(2); however, this Court finds their argument unpersuasive. By looking to the decisions of the SEC interpreting the almost identical provision in the federal statute, 15 U.S.C. § 80b-2(11), it is clear that the "teacher" exception only covers actual teachers who work for accredited and certified institutions or schools of higher learning. *See e.g.: Joseph P. Kanouse, SEC No-Action Letter,* 1977 WL 10657 (May 26, 1977) The teacher exemption is, therefore, simply unavailable to the Plaintiffs.

For the foregoing reasons, it is the **ORDER** of this Court that the Motion for Summary Judgment (Instrument no. 126) of AAFIS, Inc., is **GRANTED**.

One final observation. In the opinion of this Court had Cleary or Compher sought legal advise at the outset of this venture, competent counsel would, most likely, have advised them to enter into an enforceable written contract and properly register. Unfortunately, for the Plaintiffs, they, either purposefully or thoughtlessly, did not do so and have now suffered these adverse consequences.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

S&D TRADING ACADEMY, LLC ET AL.	§	
	§	
	§	CIVIL ACTION
VS.	§	NO. G-06-739
	§	
AAFIS INC., ET AL.	§	

FINAL JUDGMENT

On June 3, 2008, this Court issued its Opinion and Order granting the Motion for Summary Judgment of Defendant AAFIS, Inc., which is incorporated herein by reference, and it is, therefore, **ORDERED** and **ADJUDGED** that Plaintiffs, S&D Trading Academy, LLC. and S&D Global Trading, Inc., take nothing; that Plaintiffs' Complaint is **DISMISSED on the merits with prejudice**; and that Defendant AAFIS, Inc., **RECOVER** from Plaintiffs its costs of action.

THIS IS A FINAL JUDGMENT.

DONE at Brownsville, Texas, this 3rd day of June, 2008.

/s/ John Froeschner
John R. Froeschner
United States Magistrate Judge

Supreme Court, U.S.
FILED
NOV 30 2009
OFFICE OF THE CLERK

No. 09-388

IN THE

Supreme Court of the United States

S&D TRADING ACADEMY, LLC, AND
S&D GLOBAL TRADING, INC.,

Petitioners,

v.

AAFIS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the activities of the Petitioners through their two (2) owners who instructed 28 Chinese securities day traders in, *inter alia*, (a) which securities to purchase and sell (both by specific stocks and by categories), (b) the timing of such purchases and sales, (c) the markets into which such purchases and sales should be made, and (d) trading strategies to maximize day trading profits, and where Petitioners were to be compensated at a rate of one dollar ($1.00) per 1000 shares traded and a percentage of the traders' profits (herein called the "Petitioners' Activities"), constitutes rendering services as "investment advisers" under applicable Texas state and federal statutes, and if so, whether a specific state and federal exemption applies, which exempts "teachers" from registration when any investment advice they may render is solely incidental to the practice of their teaching profession.

2. Whether the Petitioners' Activities constitutes rendering services as a "dealer" under the Texas Securities Act, as amended, requiring registration under that act.

3. Whether the Petitioners' Activities constitutes rendering services as a "broker" under the Securities Exchange Act of 1934, as amended, requiring registration under that act.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent AAFIS, Inc. is a privately owned corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. Relevant Background Facts	2
II. Course Of Proceedings And Disposition In The District Court And Fifth Circuit	8
REASONS FOR DENYING THE PETITION	11
I. The Rule Of Statutory Construction Cited By Petitioners By Its Own Terms Is Inapplicable	11
II. Even If The Texas State "Teacher" Exemption Were Available Petitioners Would Be Afforded No Relief	17

Contents

Page

A. All Petitioners' Claims Fail As A Matter Of Law Because If There Is An Exemption For TSA Investment Adviser Registration, Then Petitioners Were Required To Register Under The IAA And Failed To Do So. 17

B. Additionally, All Petitioners' Claims Fail As A Matter Of Law Because They Were Required To Register As "Dealers" Under The TSA And Failed To Do So. 19

C. Additionally, All Petitioners' Claims Fail As A Matter Of Law Because They Were Required To Register As "Brokers" Under The Exchange Act And Failed To Do So. 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Akin v. Q-L Invs., Inc.,
959 F.2d 521 (5th Cir. 1992) 13

Allaire Corp. v. Okumus,
433 F.3d 248 (2d Cir. 2006) 15

Cornhusker Energy Lexington, LLC v. Prospect Street Ventures,
No. 8:04-CV-586, 2006 WL 2620985
(D. Neb. Sep. 12, 2006) 22

Massachusetts Fin. Servs, Inc. v. SIPC,
411 F. Supp. 411 (D. Mass.), *aff'd*, 545 F.2d 754
(1st Cir. 1976) 21

S&D Trading Academy, LLC v. AAFIS, Inc.,
Nos. 08-40711, 08-40776, 2009 WL 1885881
(5th Cir. 2009) ..... *passim*

SEC v. George,
426 F.3d 786 (6th Cir. 2005) 22

SEC v. Martino,
255 F. Supp. 2d 268 (S.D.N.Y. 2003) 22

SEC v. Margolin,
No. 92-Civ-6307, 1992 WL 279735
(S.D.N.Y. Sep. 30, 1992) 22

Page

SEC v. Montana,
464 F. Supp. 2d 772 (S.D. Ind. 2006) 21

Stanley v. Trinchard,
500 F.3d 411 (5th Cir. 2007) 10

STATE CASES

Bingham v. State,
913 S.W.2d 208 (Tex. Ct. Crim. App. 1995) ... 12

Breeding v. Anderson,
254 S.W.2d 377 (Tex. 1953) 20

Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1,
263 S.W.3d 910 (Tex. 2008) 11

Marks v. St. Luke's Episcopal Hosp.,
No. 07-0783 2009 WL 2667801
(Tex. Aug. 29, 2009) 11

Sterling Trust Co. v. Adderley,
168 S.W.3d 835 (Tex. 2005) 13

Cited Authorities

Page

FEDERAL STATUTES

15 U.S.C. § 78c(a)(4) 21

15 U.S.C. § 78c(a)(4)(A) 2

15 U.S.C. § 78o(a)(1) 21

15 U.S.C. § 78cc 8, 21

15 U.S.C. § 80b-1 *et seq* ..... *passim*

STATE STATUTES

Tex. Rev. Civ. Stat. Ann., arts. 581-1 *et seq.* . *passim*

Tex. Gov't Code § 311.001 *et seq.* ..... *passim*

FEDERAL ADMINISTRATIVE DECISIONS

Joseph P. Canouse, Esq., SEC No-Action Letter, 1977 WL 10657 (July 15, 1977) 16

DJZ Associates, SEC No-Action Letter, 1975 WL 9167 (Sept. 26, 1975) 15

First Global, Inc., SEC No-Action Letter, 2001 WL 499080 (May 7, 2001) 23

GlobalTec Solutions, LLP, SEC No-Action Letter, 2005 WL 3695276 (Dec. 28, 2005) 22

Cited Authorities

Page

Herbruck, Alder & Co., SEC No-Action Letter, 2002 WL 1290291 (June 4, 2002) 22

J. H. Rodgas, Jr., SEC No-Action Letter, 1974 WL 10941 (Sept. 7, 1974) 15, 16

Walter H. Shapiro, SEC No-Action Letter, 1978 WL 11703 (July 26, 1978) 15

David A. Umstead, SEC No-Action Letter, 1976 WL 12176 (Aug. 13, 1976) 16

John R. Wirthlin, SEC No-Action Letter, 1999 WL 34898 (Jan. 19, 1999) 23, 24

MISCELLANEOUS

Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce, 76th Cong. 90 (1940) (Statement of James White, representing Scudder, Stevens & Clark, Boston, Mass.) 14

STATUTORY PROVISIONS INVOLVED

Petitioners have set forth the relevant text of the statutes dealing with the definition of "investment adviser" and the associated "teacher" exemption, set forth in Texas Securities Act ("TSA"), TEX. REV. CIV. STAT., art. 581-4(N), and the Investment Advisers Act of 1940 ("IAA"), 15 U.S.C. § 80b-2(a)(11).

The TSA defines dealer as follows:

> The term "dealer" shall include every person or company other than an agent, who engages in this state, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to or orders for, or undertaking to dispose of, or to invite offers for any security or securities and every person or company who deals in any other manner in any securities within this state.

TSA art. 581-4(C). The definition of the terms "sell" and "offer for sale" and derivatives thereof, is lengthy and may be found at TSA art. 581-4(E).

The Securities Exchange Act of 1934, as amended, defines a broker as follows:

> "(4) *Broker. (A) In General.* The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others."

Section 3(a)(4)(A) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. § 78c(a)(4)(A).

STATEMENT OF THE CASE

I. Relevant Background Facts

D. J. Cleary ("Cleary") and Robert Compher ("Compher") were stock traders who "day traded" securities. They reside and do business in Texas. Cleary was approached about providing some training in day-trading securities to 28 Chinese nationals who were responsible for investing and trading the funds of Respondent AAFIS, Inc. ("AAFIS" or "Respondent"). Cleary, in turn, recruited Compher to assist him. Later, Cleary and Compher formed Petitioners S&D Trading Academy, LLC and S&D Global Trading Inc. (collectively "S&D" or "Petitioners") to perform these services. According to S&D, shortly after reaching a verbal agreement with AAFIS, Cleary and Compher began traveling from Texas to China to perform under the agreement, and traders from China also visited the United States to receive training.

These traders came to Houston, Texas, generally in groups of five or six, with each group staying a few months. In total, S&D performed training on a continuous basis for approximately 16 months. In the district court S&D claimed to have spent in excess of 422 collective "person weeks" of "training" to the 28 traders in Houston and an additional 17 collective "person weeks" in China. Thus, the activities were systematic and performed over a prolonged period of time.

While in Houston, all traders stayed in an apartment furnished with tables, multiple computers and an internet connection. The apartment was also where the vast majority of S&D's training occurred. Thus, the activities of S&D were not undertaken at an educational facility.

Petitioners refer to a portion of the Fifth Circuit opinion to characterize their services as "monitoring the live, online trading activities" of the Chinese traders while also trading on their own accounts, but neglect to reference the expansion of this activity by the Fifth Circuit in footnote 1 to the Fifth Circuit opinion.[1] Furthermore, Petitioners distort the undisputed record in the district court that the Petitioners repeatedly and regularly, among other things, would: (1) recommend both specific stocks and categories of stocks to be bought and sold by the Chinese traders each day; (2) recommend specific stocks for purchase and sale at specific times; (3) recommend when to buy and sell

[1] *S&D Trading Academy, LLC v. AAFIS, Inc.*, Nos. 08-40711, 08-40776, 2009 WL 1885881, *1 (5th Cir. 2009):

> "AAFIS submits that during the trading hours, Cleary and Compher would have the traders who were not sitting at computers beside them tell them when the traders 'got into a trade' so that Cleary and Compher could review the trade and give feedback regarding the transaction. The traders sitting beside Cleary and Compher on any given day received more intense instruction. AAFIS explains that Cleary and Compher would watch these traders more closely and would provide advice prior to the traders entering into a particular trade. These traders could also see the trades Cleary and Compher made.

stocks, i.e., the timing of transactions; (4) set stop losses for each of the traders, i.e., the point in time when each trader was required to stop trading and exit the market; (5) monitor each trader's buying and selling activities and give instructions as to which transactions to execute and when to enter and exit specific transactions; (6) conduct and announce market research to recommend and facilitate purchases and sales of stocks; (7) identify specific buyers and sellers of securities from whom the traders should buy and sell; (8) select markets into which sales and purchases could be directed by the Chinese traders; and (9) teach specific trading strategies, including verifying and predicting when New York Stock Exchange specialists were themselves buying and selling stocks so as to engage in purchases and sales in relation thereto. Without limiting the breadth of the undisputed evidence submitted below, the following quotes from the depositions of Compher and Cleary submitted as part of the record in this case indicate the level of detailed trading advice and control being exercised by Petitioners:

> A: [I]t was a little more intense type of training. You know, I could—I could mentor them a little more closely, and I could verify, you know, everything that was going on, and I could see right away what they were watching, maybe even help them—'I wouldn't even enter that trade. I see what you're looking at. I wouldn't even do that.' It wasn't—you know, they would almost tell—you know, we would work before they got into trades.

Respondent's Brief in the Fifth Circuit ("Resp. Br.") at 20-21 (quoting Compher).

> A: Like I told you, it was much more interactive. I could see what they—what stocks they were pulling up, what stocks they were studying, and I could, you know, talk—talk them through, you know, even before—you know, 'I wouldn't take that trade. I wouldn't even enter that trade. I don't like it. I like this. Here is what I would be looking for,' et cetera, et cetera. So it was more intense. As well, they could see my trades and what I was doing, whereas somebody across the table couldn't see the trades I was making.

Id. at 21 (quoting Compher).

> Q. So D.J. [Cleary] would mentor one person and you would mentor essentially one person. . . .
>
> A: As I mentioned, when those two people would enter a trade, they—they would call out the trade and say, you know, 'I'm in this.' Or they might—before that, they might say, 'Hey, I'm looking at XYZ. What do you think D.J.,' or, 'What do you think Rob?' It was a—a very small room. We were right on top of each other, and I always considered it basically one-on-one mentoring. . . .

Id. at 21 (quoting Compher).

> A: There might be a time—we both had input in her [i.e. one of the traders] trades. There might be a time where D.J. would talk to her

> for a trade, and then her next trade I might take over and tell her what I thought was right or wrong about that trade. So it was getting trained by two people. Essentially D.J. and I were training everybody.

Id. at 21-22 (quoting Compher).

> A: But we were working with everybody in that room. Every time everybody in that room made a trade, we knew about it, and we were helping them through that trade. Because somebody had their back to me, they could still hear me say, 'I wouldn't do this,' or, 'I wouldn't do that,' or et cetera, et cetera, and they were as close as you and I are.

Id. at 22 (quoting Compher).

Petitioners asserted they reached a "verbal agreement" for a roughly three-and-one-half year arrangement with AAFIS in which they were to receive: (i) "base compensation" of $1.00 per thousand shares traded by each trader they trained during a "six month probationary period" and "for up to 36 months thereafter," and (ii) "bonus compensation" calculated according to the net profits generated by each trader they trained "in months 12, 24, and 36." Petitioners did not dispute in either the district court or the Fifth Circuit, that such compensation was "transaction-based compensation."[2] Petitioners contend in this Court,

[2] For example, in response to AAFIS' April 30, 2008 Motion for Summary Judgment in the district court, Petitioners did not dispute the receipt of transaction-based compensation, but

(Cont'd)

however, without explanation or argument, that they did not receive any transaction-based compensation. Receiving compensation based on the number of transactions and the profitability of the transaction, however, is the type of compensation received by brokers and investment advisers.

While this activity was on-going, the parties unsuccessfully attempted to reduce their verbal agreement to writing. Having failed to reach a definitive agreement, AAFIS terminated the arrangement with Petitioners, effective October 2006, and Petitioners filed suit. It is undisputed that Petitioners were substantially paid for all the work they performed prior to the termination of the agreement.

(Cont'd)

argued that registration was not required even though they received transaction-based compensation. Similarly, although one section of Petitioners' brief in the Fifth Circuit was headed "Plaintiffs received no transaction-related compensation" (Petitioners' Brief in the Fifth Circuit ("Pet. Br.") at 19), the only substantive argument in that section was that the receipt of transaction-based compensation does not necessarily require registration as a broker under the Exchange Act:

> "The receipt of transaction-related compensation, without evidence of other securities-based activities that fall within the definition of a broker or dealer, does not require registration. The SEC has made clear that the receipt of transaction-related compensation is merely one factor to consider in determining whether registration is required."

Pet. Br. at 20. *See also* Petitioner's Reply Brief in the Fifth Circuit at 21-25.

II. Course Of Proceedings And Disposition In The District Court And Fifth Circuit

Following a partial summary judgment on most of their claims, and subsequent pleading amendments, as it was undisputed that neither Cleary, Compher, nor either Petitioner held any state or federal registrations or licenses, AAFIS filed a motion for summary judgment on all Petitioners' remaining claims, based in part on the fact that the undisputed underlying conduct of Petitioners required them to register as: (i) "brokers" under the Exchange Act; (ii) "investment advisers" under the IAA, 15 U.S.C. § 80b-1 *et seq.*; (iii) "dealers" under the TSA art. 581-1 *et seq.*; and (iv) state "investment advisers" under the TSA. Both the Exchange Act, 15 U.S.C. § 78cc, and the IAA, 15 U.S.C. § 80b-15(b), forbid recovery of compensation because of a failure to register when required. TSA art. 581-12, like its federal counterpart, forbids "dealers" and "investment advisers" from conducting business without first registering, and TSA art. 581-33(K) renders unenforceable any agreements pursuant to which fees and commissions are sought by an unlicensed person who is required to be licensed. It was undisputed that, should any of these four statutory provisions apply, AAFIS would be entitled to judgment as a matter of law. Further, the Petitioners' underlying conduct was undisputed.

In response to AAFIS' claims that Petitioners were acting as unregistered brokers under federal law, Petitioners simply argued that the services referenced did not constitute "engaging in the business of effecting transactions in securities for the account of others," and

as such registration as a "broker" under the Exchange Act was not required.

Petitioners did not address AAFIS' argument that Petitioners' conduct was that of a "dealer" under the TSA.

Similarly, S&D did not in either the district court or the Fifth Circuit dispute that they were performing the services of an "investment adviser" under both the IAA and the TSA, but claimed entitlement to an exemption from registration. As to the TSA, Petitioners relied on an exemption from investment adviser registration for a teacher, "whose performance of the services [of a teacher are] . . . solely incidental to the practice of the person's profession." TSA art. 581 4(N)(2).

With respect to the IAA, Petitioners relied on 15 U.S.C. § 80b-3a(a), which exempts from federal registration any investment adviser who had less than $25,000,000 in assets under his or its management at the time the services were rendered.[3] This exemption applies, however, only to an adviser who is otherwise regulated by the state in which the adviser maintains its principal office and place of business. As AAFIS pointed out and explains hereafter, this exemption from federal registration was inapplicable if Petitioners were correct that they were exempt from regulation in Texas.

On June 3, 2008, the district court entered an order granting AAFIS' motion for summary judgment.

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[3] *See* Petitioners' Response in Opposition to AAFIS' April 30, 2008 Motion for Summary Judgment in the district court at 3-4.

Petitioners incorrectly state that the district court granted summary judgment "solely" on S&D's failure to register in Texas as state "investment advisers." The district court actually held that "at the very least" Petitioners were required to be registered as "investment advisers" under the TSA and failed to do so, and that this failure barred all their claims as a matter of law. The district court thus rejected Petitioner's claimed "teacher" exemption.

On July 1, 2009, the Fifth Circuit upheld the district court's dismissal for failure to register as a state investment adviser under the TSA, thus also rejecting the claimed "teacher" exemption. In so doing, the Fifth Circuit held that it need not consider AAFIS' other grounds for upholding the summary judgment (*S&D Trading Acad.*, 2009 WL 1885881 at *7), which it could have considered since summary judgment may be affirmed on any legal ground raised below, even if it was not the basis for the district court's decision. *Stanley v. Trinchard*, 500 F.3d 411, 428 (5th Cir. 2007).

REASONS FOR DENYING THE PETITION

I. The Rule Of Statutory Construction Cited By Petitioners By Its Own Terms Is Inapplicable

Petitioners assert that Tex. Gov't Code § 311.011 (hereinafter referred to as "TGC"), is a mandated rule of construction which must apply to the interpretation of the Texas Securities Act (heretofore defined as the "TSA").[4] This is incorrect. Section 311.011 of the TGC is part of the larger act referred to as the "Code Construction Act" (TGC § 311.001 *et seq.*). The Texas Code Construction Act, by its terms applies to "each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program . . ." TGC § 311.002. The TSA, however, is not embodied in any particular "code" and therefore neither the Texas Code Construction Act in general, nor § 311.011 in particular, are applicable in the construction of any provision of the TSA. Indeed, the cases cited by Petitioners on this point involve the interpretation of a "code provision." *See, e.g., Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 925 (Tex. 2008) (interpreting the Texas Water Code); and *Marks v. St. Luke's Episcopal Hosp.*, No. 07-0783 2009 WL 2667801 (Tex. Aug. 29, 2009) (interpreting Chapter 74 of the Texas Civil Practice and Remedies Code).

Even if the Texas Code Construction Act did apply, the application of all of its provisions would afford no

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[4] It is worth noting that Petitioners' argument regarding the applicability of TGC § 311.011 was not raised in the district court and was raised in the Fifth Circuit only in the Reply Brief.

relief to the Petitioners. First, TGC § 311.003 states that the rules set forth in the Texas Code Construction Act are not exclusive but rather a non-exclusive guide meant to assist in achieving an orderly and proper construction of applicable codes. Furthermore, § 311.011(a) itself requires that words and phrases be read "in context." Indeed, *Bingham v. State*, 913 S.W.2d 208, 210 (Tex. Ct. Crim. App. 1995) states that what is crucial is not a common definition of a term, but its common definition in the particular context: "[w]hile common acceptation of an unspecialized word is certainly critical, it is the common acceptation of the word in the context in which it appears that is determinative." As noted, the phrase on which Petitioners rely—"teacher"—appears in the following context:

> "The term does not include: . . . (2) a lawyer, accountant, engineer, teacher, or geologist whose performance of the services is solely incidental to the practice of the person's profession;"

TSA 581-4(N). The context in which the term " teacher" appears involves four other recognized professions, and in fact employs the phrase, "practice of the person's profession," all of which shows the legislative intent that a person falling within this exception must have at least an established and recognized profession within one of these indicated categories, and that the investment adviser services be *solely incidental* to the practice of the regular profession indicated. Thus the context in which the word "teacher" appears cannot plausibly have the simplified meaning ascribed by Petitioners—i.e., one who teaches. As the Fifth Circuit correctly noted, the

definition proposed by S&D "is circular and imprecise. It makes a teacher anyone who teaches." *S&D Trading Acad.*, 2009 WL 1885881 at *6. Such a tautology would render the statute both circular and essentially meaningless, and § 311.023(5) allows an interpreting court to take into consideration the consequences of a particular construction.

More fundamentally, however, TSA art. 581-10-1(A) declares that the TSA is to be "construed and implemented to effectuate its general purpose to maximize coordination with federal and other states' law and administration particularly with respect to: . . . (2) exemptions." This mandate must be taken into account when the TSA's terms are interpreted, according to TGC § 311.023(1) (instructing that in construing a code provision the object sought to be obtained is to be considered). Additionally, this mandate to "maximize coordination" with federal authorities, has been judicially recognized: "Texas courts generally look to decisions of the federal courts to interpret the Texas Securities Act because of the obvious similarities between the state and federal laws." *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992). As the Fifth Circuit in this case noted, the Texas Supreme Court has explained that the Texas Legislature intended the TSA "to be interpreted in harmony with federal securities law." *S&D Trading Acad.*, 2009 WL 1885881 at *4 (citing *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840 (Tex. 2005)).

The provisions of the IAA and TSA defining investment advisers are virtually indistinguishable, but the "teacher" exemption found in both is not just similar

—it is virtually identical. The IAA exemption is quoted below, with TSA variations noted in brackets:

> "(B) [a]ny lawyer, accountant, engineer, [or] teacher, [or geologist] whose performance of such [the] services is solely incidental to the practice of his [the person's] profession;"

15 U.S.C. § 80b-2(11). The only substantive difference is that the TSA includes "geologists."[5] As a result of the fact that these provisions are virtually identical, relying upon federal authority is consistent with the intention of the Texas State Legislature and the interpretive cannons of the Texas Code Construction Act, even were it applicable.

The IAA's legislative history indicates that it was understood that the Securities and Exchange Commission ("SEC") was to determine the scope of the definition of "investment adviser."[6] Furthermore, the Fifth Circuit was correct in noting that, given the absence of any Texas or federal cases which interpreted this exemption, a court could refer to no-action letters

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[5] TSA art. 581-4(A) includes in its definition of the term security, "any instrument representing an interest in or under an oil, gas, or mining lease, fee or title . . ." As such, an exemption for a geologist who might recommend the purchase of oil and gas leases as a part of his or her profession is appropriate given Texas' extensive oil and gas industry.

[6] *Investment Trusts and Investment Companies: Hearings on H.R. 10065 before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 76 Cong. 90 (1940) (Statement of James White).

issued by the SEC as "persuasive authority" regarding the proper interpretation of a federal statute. *S&D Trading Acad.*, 2009 WL 1885881 at *4 (*citing Allaire Corp. v. Okumus*, 433 F.3d 248, 254 (2d Cir. 2006)).

The SEC, through its no-action letter program, has enunciated what practically has become a four-part test to determine whether or not someone qualifies for the "teacher" exemption, focusing on: who, where, what, and what for. All four of these prongs must be satisfied. The "who" focuses on whether the person claiming the exemption is in fact a genuine teacher practicing a teaching profession. The SEC's position is that for the exemption to apply the person proclaiming himself or herself a "teacher" entitled to rely on the exemption must in fact be "a teacher practicing his or her profession." *See J. H. Rodgas, Jr., SEC No-Action Letter*, 1974 WL 10941 at *1 (Sept. 7, 1974); *see also Walter H. Shapiro, SEC No-Action Letter*, 1978 WL 11703 at *2 (July 26, 1978) (explaining that a teacher means a "member of the teaching profession"). The SEC's interpretive guidelines require that a teacher must be actually teaching as a part of his or her regular profession. Furthermore, dispensation of any investment advice must be "solely incidental" to the professional services of a teacher. The guidelines, for example, do "not encompass a teacher who has established a separate investment advisory business." *See DJZ Associates, SEC No-Action Letter*, 1975 WL 9167 at *1 (September 26, 1975).

The "where" focuses on whether these teaching activities are conducted at an actual academic institute. In this regard, the SEC asks if the proposed "school"

has the attributes normally associated with an educational institute of higher learning and, to avoid artifice, focuses on whether the school is accredited by a state or federal agency.[7] *See, e.g., Joseph P. Canouse, Esq., SEC No-Action Letter*, 1977 WL 10657 at *1 (July 15, 1977). *See also, Rodgas*, 1974 WL 10941 at *4.

The "what" focuses on the nature of the information being "taught", namely whether it is a dispensation of general market information, or a specific curriculum designed to increase profits and profitability of a trader. The SEC inquires whether or not the curriculum being pursued is being offered as an "educational experience" versus merely for the purpose of influencing investment decision-making and assisting participants in maximizing profits from their investments. *See, e.g., David A. Umstead, SEC No-Action Letter*, 1976 WL 12176 at *1 (Aug. 13, 1976).

The "what for" focuses on the compensation received, and asks whether the teacher is compensated by means of a regular salary from his or her institution, and whether the students are charged a traditional tuition or something else. For example, the SEC inquires whether the "teacher" is paid a salary by an educational institution for whom he or she is employed. *See Canouse*, 1977 WL 10657 at *1. If the "teacher" is compensated separate from and in addition to his or her usual teaching salary, this is unacceptable. *See Umstead*, 1976 WL 12176 at *2.

[7] The activities must be as a part of an institute of higher learning, as teaching investment activities at a high school is hardly the norm.

The case at hand involves two day-traders working out of an apartment complex for fourteen months advising people about buying and selling specific stocks, at specific times, and imparting other trading strategies to be applied in the specific context of actual, live trading. Moreover, these advisers were charging $1 per thousand shares traded by each trader, as well as a percentage of profits made by the persons whom they were advising, all while they were themselves trading their own accounts. This conduct cannot be compared to a professor teaching at an accredited educational institution imparting generalized, non-specific marketing information for a salary. The Fifth Circuit correctly held: "Applying the teacher exception under these circumstances would allow almost any investment adviser to qualify for the exception so long as they accompanied their advice with a justifying explanation. This result would undermine the general purpose of the Texas Securities Act, which is 'to protect investors.'" *S&D Trading Acad.*, 2009 WL 1885881 at *6.

II. Even If The Texas State "Teacher" Exemption Were Available Petitioners Would Be Afforded No Relief

A. All Petitioners' Claims Fail As A Matter Of Law Because If There Is An Exemption For TSA Investment Adviser Registration, Then Petitioners Were Required To Register Under The IAA And Failed To Do So.

As noted above, the IAA defines "investment adviser" to include "any person who, for compensation, engages in the business of advising others, either

directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. . . ." 15 U.S.C. § 80b-2(11). Petitioners implicitly concede that their activities fall within this definition. Even if the federal authorities referenced above regarding the "teacher" exemption were disregarded in the interpretation of the TSA, there is no basis for disregarding them in the context of the IAA.

Recognizing this, to find an exemption for registration under the IAA, Petitioners instead rely on 15 U.S.C. § 80b-3a(a) which exempts from federal registration an investment adviser who has assets under management of less than $25 million. This exemption, however, is only available if the investment adviser is "regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business. . . ." 15 U.S.C. § 80b-3a(a). As Petitioners have their principal place of business in Texas, if Petitioners can rely on the "teacher" exemption in TSA art. 581-4(N)(2) to avoid registering under the TSA, then they are not "regulated or required to be regulated as an investment adviser" in Texas, and the exemption from federal registration in 15 U.S.C. § 80b-3a(a) is unavailable to them. Therefore in successfully establishing their exemption from registration under the TSA, Petitioners equally establish their obligation to effect federal registration—which they did not accomplish.

B. Additionally, All Petitioners' Claims Fail As A Matter Of Law Because They Were Required To Register As "Dealers" Under The TSA And Failed To Do So.

TSA art. 581-4(C) defines "dealer" even more broadly than the Exchange Act defines a "broker":

> The term "dealer" shall include every person or company other than an agent, who engages in this state, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to or orders for, or undertaking to dispose of, or to invite offers for any security or securities and every person or company who deals in any other manner in any security or securities within this state.

TSA art. 581-4(C). Further, the TSA's definition of "sale," "offer for sale," and "sell" include even *attempts* to dispose of securities and also include "any act" by which purchases or sales are made including solicitations of a sale, solicitations of a purchase, and even attempts to sell or offers to sell. TSA art. 581-4(E). Thus, anyone who sells or offers for sale securities, or solicits orders for offers for sales of securities, or even invites offers for sales of securities, is a "dealer." To emphasize the breadth of coverage, the TSA also includes a catch-all phrase that brings within the definition of "dealer" every person or company who deals in any other manner in any security or securities within this state. TSA art. 581-4(C). It is without dispute that the "teacher" exemption that is engrafted into the statutory definition of a Texas

"investment adviser" is irrelevant to the "dealer" analysis. TSA art. 581-12 prohibits "dealers" from conducting business without first registering, and TSA art. 581-33(K) renders void and unenforceable any contract entered into by an unregistered "dealer."

Under Texas law, even a single, isolated performance of an act requiring registration is sufficient for 581-33(K) to apply. For example, In *Breeding v. Anderson*, 254 S.W.2d 377 (Tex. 1953), plaintiffs brought suit to recover commissions earned in connection with the sale of oil and gas leases. Both presently and at the time of that decision, the term "security" under the TSA encompassed instruments representing interests in or under oil and gas leases. Therefore, plaintiffs sought compensation derived from the sale of securities. The defendant asserted, among other things, that plaintiffs' failure to register as "dealers" under the TSA was a complete defense, and the Texas Supreme Court agreed, holding that there was "no question" but that the transaction on which the plaintiffs sought to recover commissions fell within the TSA, "which prohibits recovery of a commission, or compensation for services rendered making sales of securities or real estate" unless the claimant was properly registered as a dealer. *Id.* at 379. The Texas Supreme Court rejected an "isolated transaction" exception, holding that even the performance for compensation of *one act* by a person, in connection with the procurement of a prospect for the sale or purchase of securities requires registration. *Id.* at 380. Accordingly, the Texas Supreme Court denied recovery for failure to register as a "dealer." Petitioners failed to discuss this authority in the district court and in the Fifth Circuit. It is an absolute bar to recovery,

even if Petitioners are successful in their "teacher" analysis with regard to the state investment adviser registration issue.

C. Additionally, All Petitioners' Claims Fail As A Matter Of Law Because They Were Required To Register As "Brokers" Under The Exchange Act And Failed To Do So.

Section 15(a)(1) of the Exchange Act, 15 U.S.C. § 78o(a)(1), makes it illegal for a "broker" to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security, unless such broker is registered with the SEC. 15 U.S.C. § 78o(a)(1). A "broker" is any person engaged in the business of effecting transactions in securities for the account of others. 15 U.S.C. § 78c(a)(4). There is no requirement to prove scienter to establish a violation of this statute. *SEC v Montana*, 464 F. Supp. 2d 772, 785 (S.D. Ind. 2006). Section 29(b) of the Exchange Act makes any contract or arrangement entered in violation of the securities laws void and unenforceable. 15 U.S.C. § 78cc(b).

In this case, Petitioners' own testimony demonstrates "a certain regularity of participation in securities transactions at key points in the chain of distribution" for the numerous securities transactions involving the Chinese traders whose training is at issue, and this triggers the registration requirements of the Exchange Act. *Mass. Fin. Servs., Inc. v. SIPC*, 411 F. Supp 411, 415 (D. Mass.), *aff'd*, 545 F.2d 754 (1st Cir. 1976). Further, Petitioners bargained for and received "transaction-based compensation"—compensation that

is in any way, directly or indirectly, tied to the "size, value, or occurrence" of securities transactions[8]—for that training, including compensation based on the number of securities transactions made. "Transaction-based compensation" is "one of the hallmarks of being a broker-dealer." *Cornhusker Energy Lexington, LLC v. Prospect Street Ventures*, No. 8:04-CV-586, 2006 WL 2620985 at *6 (D. Neb. Sep. 12, 2006); *see also SEC v. George*, 426 F.3d 786, 797 (6th Cir. 2005); *SEC v. Martino*, 255 F. Supp. 2d 268, 283-84 (S.D.N.Y. 2003); *SEC v. Margolin*, No. 92-Civ-6307, 1992 WL 279735 at *5 (S.D.N.Y. Sep. 30, 1992).

Petitioners received "transaction-based compensation" tied to the number of stock trades made. Indeed, Petitioners' own evidence establishes that they billed AAFIS at the rate of $1.00 per thousand shares traded and that all their invoices were paid. The receipt of transaction-based compensation is the single most important indicator of being a "broker" because recipients of transaction-based compensation have a "salesman's stake" in encouraging securities transactions, regardless of their underlying investment value to investors. *See Herbruck, Alder & Co., SEC No-Action Letter*, 2002 WL 1290291 at *2 (June 4, 2002). Accordingly, the SEC has repeatedly held that the receipt of transaction-based compensation required registration as a "broker" even though the conduct of

[8] *See GlobalTec Solutions, LLP, SEC No-Action Letter*, 2005 WL 3695276 at *1 (Dec. 28, 2005). As noted above, in both the district court and the Fifth Circuit, Petitioner's not only did not dispute that they received transaction-based compensation, they essentially acknowledged it. *See* discussion *supra* at note 2.

the party in question was more remote and isolated than was Petitioners', and numerous no-action letters to this effect substantiate this point.[9]

For example, in *John R. Wirthlin, SEC No-Action Letter*, 1999 WL 34898 (Jan. 19, 1999), an unregistered person sought instruction from the SEC about the requirements for "broker" registration for a business where Wirthlin proposed to contact professionals (such as accountants and real estate brokers) who might have clients interested in exchanging their interests in real estate for registered securities. *Id.* at *1. Wirthlin proposed to contact only professionals and would have no direct contact with investors. Wirthlin disclosed that he would receive what the SEC termed "transaction-based compensation," as his fee would be based on the consummation of transactions that were the result of Wirthlin's introductions. *Id.* Consistent with its past pronouncements, the SEC took the position that even though Wirthlin was not meeting with any prospective purchasers or customers, he would nevertheless be soliciting them indirectly to make investments in securities through their advisers. *Id.* This required registration. *Id.* The SEC also specifically noted that Wirthlin would receive transaction-based compensation, "one of the hallmarks" of a broker-dealer. *Id.*

[9] Indeed, the SEC has taken the position that even if a registered person properly receives transaction-based compensation, if there is a formal or even an informal obligation to turn that compensation over to a third person, then that third person must also be registered as a "broker" as the third person would then be receiving transaction-based compensation. *See, e.g., First Global, Inc., SEC No-Action Letter*, 2001 WL 499080 at *1-3 (May 7, 2001).

Petitioners' argument here that they were not acting as brokers as that term is understood in the Exchange Act is at odds with the *Wirthlin* and other SEC No-Action Letters because the admitted activities of Petitioners were much closer to the "key points in the chain of distribution," which is determinative in deciding whether registration is required, than were the proposed activities of which were the subject of the *Wirthlin* SEC No-Action Letter.

In this case, the activities of Petitioners described above, together with their receipt of transaction-based compensation, was sufficient to bring Petitioners within the definition of "brokers" under the Exchange Act. Therefore, they were required to register with the SEC and did not do so. This, alone, would be an absolute bar to recovery, even if a court found the "teacher" exception to Texas state investment adviser registration applicable.

CONCLUSION

For these reasons, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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